JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

Mohd Naki bin Mohd Yusuf v Public Prosecutor

A

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–284 OF 2012(B)

B

ARIFIN ZAKARIA CHIEF JUSTICE (MALAYA), SURIYADI, AHMAD MAAROP, HASAN LAH AND ZALEHA ZAHARI FCJJ

24 JULY 2014

C

Criminal Law — Penal Code — s 302 — Murder — Accused person convicted of charge and sentenced to death — Appeal against conviction and sentence of High Court and affirmation of Court of Appeal — Evidence of child witness — Whether corroborated — Whether evidence admissible — Whether correctly admitted — Whether conviction and sentence safe

D

The appellant was charged under for murder, an offence under s 302 of the Penal Code. The deceased and the appellant were working as guards. The appellant's wife ('SP18') had lodged a police report that the deceased was missing and that she received a call from the appellant, informing her that he had hit and murdered the deceased. According to SP18, the appellant further testified that he had thrown the body near the highway and that the appellant had also threatened to kill her. The deceased's body was recovered from the water tank at a factory compound on 22 May 2007. The prosecution relied on the direct evidence of the appellant's child ('SP16') and the circumstantial evidence of SP18. SP16 gave evidence that she had witnessed a quarrel between the appellant with the deceased and that the appellant then assaulted and hit the deceased with an iron rod. The appellant's defence were found to be one of bare denial and an afterthought. The High Court convicted the appellant and sentenced him to death. An appeal to the Court of Appeal was dismissed. In the present appeal, the appellant submitted that the trial judge had erred in not applying the correct principles in evaluating the circumstantial evidence and that it was necessary for the evidence of the child witnesses, SP16 and SP17, to be corroborated; and that the trial judge had erred in taking into consideration police report against the appellant when there was no evidence to whom the mobile phone number referred to in the report was registered against. On the other hand, the prosecution submitted that the appellant had the motive to kill as he suspected his wife, SP18, was having an extra marital relationship with the deceased; and that there was in evidence, the phone call made by the appellant to SP18, telling her that he had killed her lover and to have thrown the body by the highway.

E

F

G

H

I

Held, allowing the appeal:

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

(1) The trial judge had not properly evaluated and appraised the evidence and thus his assessment of the evidence was not in accord with the principles enunciated by law. The trial judge had also not correctly applied the correct legal principles to the facts and circumstances of this case as His Lordship's findings that the evidence taken cumulatively irresistibly pointed to the appellant having killed the deceased was not supported by evidence (see para 56).

(2) The trial judge who heard the evidence of child witnesses, SP16 and SP17, had not conducted a preliminary inquiry as to their comprehension of the duty of speaking the truth and the nature of an oath or affirmation. There was also discrepancy as to the date mentioned and the evidence of the witnesses in this case. It was established that SP16, who testified that she saw the fight between the appellant and the deceased, was with SP18 in Sungei Besi on the date in question. SP16 therefore could not have possibly witnessed the event that occurred on the night of of the tragedy at her home in the factory compound, in Kajang. SP16's testimony accordingly could not be true (see paras 50 & 52).

(3) In absence of any investigation to confirm whether the mobile phone number was registered in the appellant's name, there was no confirmatory evidence that the appellant was the registered owner or user of the mobile phone number on the day in question. There was necessity to check against whom the mobile number was registered. The police should have caused investigations to be made with the relevant telecommunication service provider for the confirmatory evidence (see paras 54–55).

[Bahasa Malaysia summary

Perayu telah dituduh kerana membunuh, kesalahan di bawah s 302 Kanun Keseksaan. Si mati dan perayu bekerja sebagai pengawal keselamatan. Isteri perayu ('SP18') telah membuat laporan polis bahawa si mati hilang dan bahawa dia menerima panggilan daripada perayu, memberitahu dia yang dia memukul dan membunuh si mati. Mengikut SP18, perayu selanjutnya memberi keterangan yang dia telah membuang mayat berdekatan dengan lebuh raya dan bahawa perayu juga mengancam untuk membunuhnya. Mayat si mati ditemui daripada tangki air di kawasan kilang pada 22 Mei 2007. Pihak pendakwaan bergantung ke atas keterangan langsung anak perayu ('SP16') dan keterangan keadaan SP18. SP16 memberi keterangan bahawa dia menyaksikan pergaduhan di antara perayu dan si mati dan bahawa perayu kemudiannya menyerang dan memukul si mati dengan batang besi. Pembelaan perayu didapati satu penafian kosong dan sesuatu yang difikirkan kemudian. Mahkamah Tinggi menyabit perayu dan menjatuhkan hukuman mati ke atasnya. Rayuan ke Mahkamah Rayuan ditolak. Dalam rayuan ini, perayu berhujah bahawa hakim perbicaraan telah tersilap dalam tidak mengguna pakai prinsip yang betul dalam menilai keterangan keadaan dan

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

bahawa adalah perlu untuk keterangan saksi kanak-kanak, SP16 dan SP17, disokong; dan bahawa hakim perbicaraan tersilap dalam mengambil kira laporan polis terhadap perayu apabila tidak terdapat keterangan nombor telefon bimbit siapakah yang dirujuk di dalam laporan yang didaftarkan. Sebaliknya, pihak pendakwaan berhujah bahawa perayu mempunyai motif untuk membunuh kerana dia mensyaki isterinya, SP18 mempunyai hubungan sulit dengan si mati; dan bahawa terdapat keterangan, dalam panggilan telefon yang dibuat oleh perayu kepada SP18, memberitahunya bahawa dia telah membunuh kekasihnya dan telah membuang mayat di tepi lebuhraya.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan tidak menilai dan menaksir dengan betul keterangan oleh itu penaksirannya terhadap keterangan tidak selaras dengan prinsip yang ditetapkan oleh undang-undang. Hakim perbicaraan juga tidak mengguna pakai prinsip undang-undang yang betul kepada fakta dan keadaan kes ini memandangkan dapatan Yang Arif bahawa keterangan yang diambil secara kumulatif tidak dapat ditahan mengarah kepada perayu membunuh si mati tidak disokong oleh keterangan (lihat perenggan 56).

(2) Hakim perbicaraan yang mendengar keterangan saksi kanak-kanak, SP16 dan SP17, tidak menjalankan siasatan awalan terhadap pemahaman kewajipan untuk bercakap benar dan sifat mengangkat sumpah dan pengakuan. Juga terdapat percanggahan kepada tarikh yang disebut dan keterangan saksi-saksi dalam kes ini. Ia telah dibuktikan bahawa SP16, yang memberi keterangan bahawa dia melihat pergaduhan di antara perayu dan si mati, berada dengan SP18 di Sungei Besi pada tarikh yang dipersoalkan tersebut. SP16 oleh itu tidak mungkin menyaksikan kejadian tersebut yang berlaku pada malam tragedi di rumahnya, di dalam kawasan kilang, di Kajang. Keterangan SP16 oleh itu tidak benar (lihat perenggan 50 & 52).

(3) Dalam ketiadaan apa-apa siasatan untuk mengesahkan sama ada nombor telefon bimbit didaftarkan di atas nama perayu, tidak terdapat keterangan pengesahan bahawa perayu adalah pemilik berdaftar atau pengguna nombor telefon bimbit pada hari yang dipersoalkan. Terdapat keperluan untuk memeriksa terhadap siapakah nombor telefon tersebut didaftarkan. Polis sepatutnya menyebabkan siasatan dibuat dengan relevan pemberi perkhidmatan telekomunikasi untuk pengesahan keterangan (lihat perenggan 54–55).]

Notes

For cases on s 302 of the Penal Code, see 4(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1899–2031.

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405, FC (refd)

R v Dossi (1918) 13 Cr App Rep 158 (refd)

Legislation referred to

Evidence Act 1950 s 133A
Evidence of Child Witness Act 2007
Penal Code s 300(a), (b)

Appeal from: Criminal Appeal from No 05–164 of 2010 (B) (Court of Appeal, Putrajaya)

Naran Singh (Naran Singh & Co) for the appellant.
Nurulhuda Nur'aini bt Mohd Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zaleha Zahari FCJ:

[1] The charge preferred against the appellant in this appeal was as follows:

> Bahawa kamu pada 14 April 2007, jam lebih kurang 9.30 malam, di Kilang Sin Guan Huat, Jalan Perusahaan 3, Beranang, Kajang, di dalam Daerah Hulu Langat di dalam Negeri Selangor Darul Ehsan telah membunuh Nowshad (Passport Pakistan No. AB9613051) dan oleh yang demikian telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The first trial judge who had conduct of this case had, between the period 22 October 2007–19 November 2008, heard 16 of the prosecution's witnesses (SP1–SP16). The evidence of SP16 was critical to the prosecution's case as that was the direct evidence upon which the prosecution's case rests.

[3] The learned trial judge's decision under appeal, of the prosecution having made a prima facie case against the appellant, then calling him to enter his defence, heard the testimony of another five witnesses (SP17–SP 21). The evidence of SP18, Aziemah bt Abdullah (the appellant's wife, the complainant in this case) was the circumstantial evidence relied upon by the prosecution upon whom the trial court drew inferences as to the appellant's guilt.

[4] At the end of trial, after appraising all of the evidence before him, the learned trial judge's finding was that the appellant had failed to raise a reasonable doubt in his favour, recorded a finding of guilt, then imposed the mandatory sentence of death upon him. The appellant's appeal against conviction and sentence was subsequently dismissed by the Court of Appeal upon affirming the decision of the High Court judge.

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

[5] In submissions before us the appellant's counsel confined himself to grounds 1, 3 and 4 of the memorandum of appeal. The appellant counsel's submission was that the learned trial judge had erred by not applying the correct principles in evaluating the circumstantial evidence in this case, and that it was necessary for the evidence of the child witnesses, (SP16 and SP17), to be corroborated in material particulars pursuant to s 133A of the Evidence Act 1950 of which there was none. It was also the appellant's case that the learned trial judge had erred in taking into consideration police report exh P46 against the appellant when there was no evidence to whom the mobile phone number referred to in this report was registered againts.

THE EVIDENCE

[6] The evidence before the learned trial judge were these. The appellant at the material time was employed as a 'Jaga' at Kilang Sin Guan Huat situated at the place specified in the charge. Likewise, the deceased person named in the charge, Nowshad, was also working as a 'Jaga' at the same place.

[7] The complainant, the appellant's estranged wife, Aziemah bt Abdullah ('SP18') was unable to contact Nowshad and also did not hear from him. SP18 went, on 20 May 2007, to Beranang Police Station to lodge a missing person's report. SP18 met Sgt Amir Fadzil bin Mokhtar ('SP6'). SP18 testified that when she was at the said police station her mobile phone bearing No 016-97162020 rang. That call was from mobile phone No +60146600244, which, according to SP18, was the appellant's mobile phone and that the appellant told her that he had killed her lover and had thrown his body near the highway.

[8] SP18 then lodged police report Beranang/000631/07 (exh P46) as follows:

> PADA 20/05/2007 JAM LEBIH KURANG 12.45 PM SEMASA BERADA DI RUMAH SEPERTI ALAMAT DIATAS SAYA TELAH TERIMA PANGGILAN TELEFON DARIPADA SUAMI SAYA NAMA: MOHD NAKI BIN YUSUF (014-6600244) DARI MANA DIA BUAT PANGGILAN TELEFON SAYA TIDAK TAHU. BELIAU TELAH BERITAHU SAYA PADA 14/04/2007 BELIAU TELAH PUKUL KAWAN SAYA NAMA: NOWSHAD, WARGANEGARA: PAKISTAN DI KILANG SIN GUAN HUAT JLN PERUSAHAAN 3 KAWSN PERINDUSTRIAN 43700 BERANANG SELANGOR. DIA JUGA BERITAHU TELAH BUNUH KAWAN SAYA TERSEBUT DAN BUANG DI TEPI LEBUH RAYA MANA SAYA TIDAK TAHU. SAYA TELAH TIDAK NAMPAK KAWAN SAYA TERSEBUT DARI TARIKH 14/04/2007 HINGGA HARI INI. SUAMI SAYA JUGA ADA UGUT HENDAK BUNUH SAYA. HAL INI BERPUNCA DARI PERASAAN

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

A CEMBURUKAN NOWSHAD BERKAWAN BAIK DENGAN SAYA. TUJUAN SAYA BUAT REPOT KERANA TAKUT PERKARA YANG TIDAK DIINGINI. SEKIAN REPOT SAYA.

B **[9]** There is also evidence of SP18 informing the investigating officer who had the conduct of this case ('SP21'), of having received a threatening SMS from mobile phone No +60146600244 to her mobile phone as shown in photograph exh P30 which SMS was as follows:

C Kau tak peduli aku ye. Aku akan ajar kau. Ini bukan ugut. Kau nampa itu anak haram. Kepala dia. Macam apa. Lebih dari itu awak boleh kena. Kalau tak nak call sekarang. Perampuan sex gila.

Sender Shah

+60146600244.

D **[10]** In court SP18 testified, inter alia, as follows:

Pada 20.5.2007 kami tidak tinggal bersama, saya keluar selepas kejadian pergaduhan antara saya OKT dan Nowshad, iaitu sebulan sebelum saya buat report tersebut.

E Pada 14.4.2007 saya berada di rumah bapa saya di Sungei Besi. OKT ada datang ke rumah bapa saya pada hari itu bersama dengan 2 orang anak saya iaitu SP16 dan SP17. OKT kata sesuatu berlaku disana iaitu di Kilang. Dia kata jagalah anak-anak; dia hendak pergi.

F Pada 14.4.2007 saya tinggal di rumah bapa saya kerana ada selisih faham dengan suami (OKT) kali terakhir saya jumpa Nowshad di rumah bapa saya. Saya tak ingat tarikh. Dia bawa saya dan anak ke hospital kerana anak saya sakit. Anak saya sakit. Saya ingin bawa ke hospital tiba-tiba Nowshad datang dan dia bawa kami ke hospital. Itulah kali terakhir saya jumpa dia. Kali terakhir saya jumpa OKT 14.4.2007 semasa dia hantar 2 orang anak saya ke rumah bapa saya.

G **[11]** The appellant's 14 year old daughter, Nazmie Jaan bt Mohd Naki ('SP16') and 13 year old son, Syed Ahmad Nawab Shah bin Mohammad Naki ('SP17'), were called to give evidence for the prosecution. Both testified to knowing a person named 'Nowshad' whom they call 'Uncle Amid'. Other than Uncle Amid being at his house about a month prior to his father's arrest, SP17's evidence did not incriminate the appellant.

H **[12]** SP16 testified that Uncle Amid was at her home situated in the factory compound named in the charge. No specific date was mentioned in SP16's examination-in-chief, but in cross-examination, the events she was describing was sometime in the month of April 2007. As for SP17, his testimony was in relation to a night about a month prior to his father's arrest.

I

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

[13] SP16 testified that after she went to the toilet that particular night she saw Uncle Amid talking to her father. A quarrel then broke out. She felt scared. From her room SP16 said, 'mereka gaduh lebih kuat lagi'. SP16 testified 'uncle duduk di lantai. Ayah masa itu ada depan dia mengadap uncle. ... Saya ada nampak macam ayah pegang apa saya tak nampak'. SP16 then said, 'Saya memang nampak ayah saya pukul dengan besi. Memang saya nampak. ... Pagi tadi saya kata saya tak nampak sebab saya takut .... Masa saya nampak ayah pegang besi, Uncle Amid masih di bawah'.

[14] Both SP16 and SP17 testified that the following day, the appellant sent them to Sungei Besi where their mother (SP18) was staying.

[15] Inspector Ridhuan bin Abdullah ('SP20') was the investigating officer who initially conducted investigations into the report P46 lodged by SP18. SP20 went to the factory premises stated in report exh P46 (ie the place named in the charge) on the same date the report was lodged (20 May 2007). Some photographs of the factory compound were taken during this visit. SP20 met Poon Ah Soon ('SP11') who was then the supervisor of the said factory. SP11 informed SP20 that the person reported as missing was known to him as 'Bangia'. Nothing of significance was discovered at this stage of investigations. SP11 was told to contact the police should he see the missing person 'Bangia'.

[16] The following day, on 21 May 2007, SP20 went again to the factory premises together with a forensic team led by *penolong penguasa polis* Abdul Aziz bin Ahmad ('SP13'). Four swaps believed to be blood were taken (P41–P43) from the wall under the staircase, entrance as well as outside of the appellant's house.

[17] The next day, on 22 May 2007, upon being informed of the discovery of a dead body in the water tank at the factory compound, SP20 went again to the said factory. Officers from the Fire Department were already at the scene when he arrived there. They assisted in taking the body out of the water tank. At about 5pm that day SP20 briefed ASP Ramlan bin Hj Abdul Razak (SP21) who then took over the investigations.

[18] SP11, the supervisor of the factory testified that the appellant was employed as a 'jaga' of the factory. Nowshad was also one of the factory's employees. After SP20's visit to the factory on 20 May 2007 SP11 made a search of the factory compound. When he smelt a foul smell emanating from the water tank at the factory compound on 22 May 2007, SP11 notified the police. The police recovered a decomposed body from the said water tank. The last time SP11 saw Nowshad was prior to 30 April 2007. When he resumed work on 4 May 2007 Nowshad was nowhere to be seen. The last time SP11 saw the appellant was also prior to the same date, 30 April 2007.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

[19] SP21, who took over the investigations from SP20, had on 23 May 2007, together with SP20, went to Hospital Serdang. Three of Nowshad's friends, as well as SP18 were present for the purpose of identifying the body.

[20] SP21 described the condition of the corpse to be as follows:

> Kepala bercerai daripada badan simati pakai jeans biru tua, seluar dalam kelabu, jacket merah, kemeja T biru muda, cincin di jari dan 1 gelang hitam di tangan.
>
> Jasad sudah teruk reput dan tiada pengecaman dapat di buat. Dari saksi-saksi simati pernah alami kemalangan jalan raya Jun/ July 2003. Sebab kemalangan kaki kananya patah.

[21] Although the corpse was beyond recognition due to decomposition, SP21 testified that SP18 had positively identified the body to be that of her friend, Nowshad, based on the ring on the finger (P48), bracelet on the wrist (P11), and clothes worn by the deceased.

[22] SP21 testified that SP18 informed him that Nowshad often wore the ring (P48) and bracelet (P11) and that the t-shirt (P18A) and jacket (P19A) worn by deceased were given by her to Nowshad as presents. It is in evidence that SP18, when shown t-shirt and jacket (P18A and P19A), confirmed them to be the t-shirt and jacket which she had given to Nowshad as a present.

[23] In the course of his investigations SP21 was also informed by Nowshad's friends that Nowshad had, sometime in June/July 2003, been involved in an accident and to having injured his foot.

[24] SP21 was present the following day on 24 July 2007 at the post mortem of the decomposed body carried out by Dr Shahidan bin Md Noor ('SP14'). SP14 testified that the facial bones of the deceased were crushed. He was of the opinion that such an injury could have been caused by a blunt object such as a wood or an iron rod. The cause of death of the deceased was due to the head injury or injury to the brain. When shown photograph exh P29 (photograph 10) SP14 testified:

> Saya tak masuk dalam lapuran saya tapi semasa pengecaman mayat Pegawai Penyiasat memberi tahu saya simati ada mengalami kecederaan di tulang kaki. Jadi yang di tunjukkan di gambar 10 ialah proses penyembuhan yang bonggol di tengah-tengah. Sembuh tidak betul.

[25] A sample of the bone marrow of the deceased was taken for DNA analysis.

[26] Sharizah bt Alimat ('SP15'), the chemist, conducted a DNA profiling of the bone marrow taken from deceased and the samples believed to be blood

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

recovered from the vicinity of the appellant's house taken by the forensic team led by SP13. SP15 was of the opinion that the DNA profiling of the blood stain A1 matched the DNA profile of the bone specimen taken from the deceased indicating the DNA identified were from the same source.

[27] Based on the evidence before him the learned trial judge made a finding that the prosecution had proved a prima facie case against the appellant and called upon him to enter his defence.

THE DEFENCE

[28] The appellant gave evidence under oath. He denied killing Nowshad and of Nowshad being present at his house. He denied seeing the alleged weapon exh P22A. Mobile telephone No 014-6600244 did not belong to him. He never made any call or SMS from this mobile phone number. The SMS shown in photograph exh 30 was not sent by him. The contents of the police report exh P46 lodged by SP18 was untrue. As to why he left his two children, SP16 and SP17, with his wife SP18, that was because he had to work in Johor, not because he was running away, as well as because his wife threatened not to return to the matrimonial home for as long as he was around.

[29] The learned judge found the defence to be one anchored on bare denials and an afterthought. On the appellant's denial of mobile telephone No 014-6600244 not belonging to him the trial judge ruled:

> semasa melihat demeanour SP18 ketika memberi keterangan tentang nombor telefon suami beliau (OKT) iaitu 014-6600244 secara spontan. Nombor telefon di berikan oleh SP18 didalam laporan Polis EX P46; ianya di buat seawal 20.5.2007.

[30] He then made a finding that the appellant had not raised a reasonable doubt in his favour. The appellant was then convicted and the mandatory sentence of death was then imposed upon him. On appeal, these findings and decision were upheld by the Court of Appeal.

[31] We will now deal with the issues raised by the appellant's counsel in turn.

Was the decomposed body recovered from the water tank at the place stated in the charge Nowshad

[32] The appellant's counsel submitted that the prosecution had not positively proved that the decomposed body recovered from the water tank at the place named in the charge, Kilang Sin Guan Huat, Jalan Perusahaan 3, Beranang, Kajang, was in fact the deceased person named in the charge, ie 'Nowshad'.

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

[33] The appellant's counsel stressed the following facts: the fact that there was no documentation as to the identity of the decomposed body when the body was recovered; the fact that only photocopies of passport P31 and P32 were tendered; the fact that SP11, when shown the photograph in the copies of passport P31 and P32, had testified that the person known to him was thinner; the fact that SP11 was not called to identify the body recovered at the post mortem of the body recovered; the fact that SP16 had not identified the 'UNCLE' who came to her house that particular night in question.

[34] The DPP took issue. She submitted that the prosecution had proved beyond doubt that the decomposed body recovered from the water tank in the factory compound specified in the charge was in fact Nowshad. The decomposed body was wearing a t-shirt and jacket (P18A and P19) which had positively been identified by SP18 to have been given by her to Nowshad as a present. SP18 had also recognised the ring (P48) and bracelet (P11) recovered from the body as those usually worn by Nowshad. There is the confirmation of the information given to the investigating officer (SP21) by Nowshad's friends, of Nowshad being involved in an accident in June/July 2003 and having injured his foot. The pathologist (SP14) in his evidence had confirmed the presence of a 'bonggol' on the left foot thus corroborating the information given to SP21 of Nowshad having injured his foot arising from being involved in an accident.

[35] Our findings on this issue are as follows. We find this challenge of the decomposed body not being Nowshad to be devoid of merit. We are in agreement with the submissions of the DPP on this issue, that the prosecution had proved beyond reasonable doubt that the body recovered from the water tank at the factory compound at the place named in the charge to be 'Nowshad'. The positive identification by SP18 of the t-shirt and jacket (P18A and P19) worn by the deceased to be presents given by her to Nowshad. The identification by SP18 of the ring (P48) and bracelet (P11) recovered from the body being the ring and bracelet normally worn by Nowshad. The presence of the 'bonggol' on the left foot of the deceased, as testified by the pathologist (SP14), was corroborative evidence of the information given to the investigating officer (SP21) of Nowshad having injured his foot arising from an accident in June/July 2003. Any one of these items taken alone might be capable of explanation. However, the nexus of these items to Nowshad that has arisen and defect on the left foot of the body, compels one to only one conclusion, that the decomposed body recovered from the water tank in the compound of the factory named in the charge was in fact Nowshad, and no one else.

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

Whether Nowshad's death was caused by or in consequence of the act of the appellant with the intention of causing death or with the intention of causing such bodily harm as likely to cause death on the date and place named in the charge

[36] It was incumbent upon the prosecution to prove the other ingredients of the charge of murder: that Nowshad's death must have been caused by, or in consequence of the act of the appellant; that such act were done with the intention of causing death or with the intention of causing such bodily harm as likely to cause death, and that the act was committed on the date and place stated in the charge.

THE APPELLANT COUNSEL'S SUBMISSIONS

[37] The appellant's counsel submitted that the learned trial judge had failed to give sufficient consideration to the discrepancies in the testimony of the prosecution witnesses as to dates. Had he done so, he would not have arrived at the conclusion that the appellant was the person who had killed Nowshad.

[38] The appellant was alleged to have committed this crime on '14.4.2007 at about 9.30pm at Kilang Sun Guan Huat, Jalan Perusahaan 3, Beranang, Kajang Selangor'. He stressed the date, '14.4.2000' and the place of the commission of the crime 'Kilang Sun Guan Huat'.

[39] The appellant counsel highlighted the following evidence: SP18 had testified that on '14.4.2007' the appellant had brought their two children, SP16 and SP17, to Sungei Besi where she was then staying. Both SP16 and SP17 in their respective testimony had testified that the following morning after Uncle Amid came to their home that particular night they were testifying about, they were both sent to their grandfather's house at Sungei Besi where their mother SP18 was then staying. He submitted that, logically, if these two young children, SP16 and SP17 were with their mother SP18 in the morning of 14 April 2007 in Sungei Besi, how could SP16 and SP17 be a witness to what transpired at their home in the factory compound at 9.30pm of 14 April 2007? The prosecution's reliance on SP16's direct evidence accordingly collapsed. SP16's evidence cannot possibly be true as she was then in Sungei Besi together with SP18.

[40] In any event SP16's evidence was contradictory as admitted by SP16 herself, at one point saying she did not see what her father/the appellant was holding, then saying that she saw him holding something but did not know what it was, then saying that she did not see what he did with what he was holding, and only then testified to seeing the alleged assault of Uncle Amid by the appellant. SP17 had also contradicted SP16 evidence of him going to the toilet when SP16 described the quarrel and assault of Uncle Amid by her father.

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

[41] As to the circumstantial evidence relied upon by the prosecution, the inferences to be drawn from calls and SMS made from mobile phone No 60146600244 to SP18's mobile phone number, the appellant denied having a mobile phone and that mobile phone bearing No 60146600244 did not belong to him. The appellant had also denied sending the SMS shown in exh P30. The appellant's counsel pointed out that the sender of the SMS P30 was a person by the name of 'Shah'. There was no confirmatory evidence adduced by the prosecution that the appellant was the registered owner/user of mobile phone No 60146600244. In this situation the learned trial judge had erred in concluding that the SMS P30 was sent by the appellant.

[42] The appellant counsel submitted that the evidence taken cumulatively did not irresistibly point to the appellant being the person who killed Nowshad.

THE DPP'S SUBMISSION

[43] The appellant had the motive to kill as he suspected his wife SP18 was having an extra marital relationship with Nowshad. The constant quarrels between them arising from SP18's relationship with Nowshad had led to SP18 leaving the matrimonial home situated at the factory premises named in the charge.

[44] There is in evidence the phone call made by the appellant to SP18, telling her that he had killed her lover and to having thrown the body by the highway. There is also in evidence a threatening SMS sent by the appellant (exh P30) to SP18. There is also the evidence of flight, the appellant bringing his two children, SP16 and SP17, from their home in the factory compound to Sungei Besi to be with their mother SP18 (who by then had left the matrimonial home), thereafter not turning up for work at the factory where he was employed. All these factors according to the DPP point to the guilt of the appellant.

[45] The evidence of the DNA profiling of blood obtained from the wall of the appellant's home was also significant. Such a finding, when considered with the deceased body found in the water tank within the factory compound with head injuries, strongly supports the inference that the appellant was the assailant who took Nowshad's life. The trial judge was right in drawing the inferences which he did from the evidence of SP18 that the appellant was the person who committed this crime.

[46] SP16 had described what she witnessed that particular night in question. The quarrel between her father with Uncle Amid, her father then

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

assaulting and hitting Uncle Amid with an iron rod. The DPP submitted that SP16 was a competent witness and the trial judge did not err in accepting the evidence of SP16.

[47] The DPP submitted that the learned trial judge was right in finding that the prosecution had proved a prima facie against the appellant, and at the end of trial, in finding that the prosecution had proved its case beyond reasonable doubt that the appellant was the person who killed Nowshad.

THE DECISION

[48] A prima facie case is one that is sufficient for the appellant to be called upon to answer. This means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all of the evidence adduced so as to determine whether the elements of the offence have been established. The force of the evidence adduced must be such that, if unrebutted, is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen.

[49] Nowshad's death was due to the injuries inflicted upon a vital part of his body, his head, as described by the pathologist (SP14). From the injuries sustained by Nowshad there was clearly an intention to cause death under para (a) of s 300 of the Penal Code or the intention to injure knowing that such act would cause death under para (b).

[50] The direct evidence that the appellant was the person who hit the deceased with an iron rod came from a child witness (SP16) who had given evidence on oath and whose evidence was not corroborated. The manner a child witness may choose to give his/her evidence is provided by the Evidence of Child Witness Act 2007. Section 133A of the Evidence Act 1950 provides for the weight to be given to the evidence of a child witness and the proviso to this s 133A expressly provides that an accused is not liable to be convicted unless the evidence is corroborated by some other material evidence thereof implicating him. We observe that the trial judge who heard the evidence of child witness SP16, as well as the trial judge who heard the evidence of child witness SP17, had not conducted a preliminary inquiry as to their comprehension of the duty of speaking the truth and the nature of an oath or affirmation.

[51] The date specified in the charge was '14.4.2007'. Is the date an essential part of the alleged offence in this case? Clearly each particular case must depend

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

on the facts and circumstances of the particular case. Atkin J in *R v Dossi* (1918) 13 Cr App Rep 158 held that the date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. However the Federal Court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405, at p 422 held that the date is an essential ingredient of the charge. The material witness in that case gave three different dates, in three different years, the first two covering a period of one month each and the third covering a period of three months as the date of the alleged conduct. The charge against the first appellant in that case had to be amended twice. The Federal Court bore in mind the fact that it was not a matter of one or two days, one or two weeks or even one or two months. It covers a period of three years (1992, 1993 and 1994) and, even the last date given was one night in a period of three months.

[52] We have examined the dates mentioned and the evidence of the witnesses in this case closely. The appellant's counsel was certainly right in stating that there was a discrepancy as to dates. SP17 was testifying to a certain night about a month prior to his father's arrest. Bearing in mind the fact that the appellant was arrested on 1 September 2007, a month prior to his father's arrest would bring us to '1.8.2007' not the month of April 2007. SP16 was describing what she saw in the month of April 2007 without mentioning any specific date in April. Both SP16 and SP17 had testified to the appellant bringing them to where SP18 was staying in Sungei Besi the following morning.

[53] SP18, had already, prior to this date, 14 April 2007, left the matrimonial home at the factory compound arising from her relationship with Nowshad. SP18 testified that the appellant had brought the children to her in Sungei Besi on 14 April 2007. SP18 did not state the specific time on 14 April 2007. If however both SP18 evidence were to be considered together with SP16's evidence, it would be in the morning of 14 April 2007. The appellant's counsel was in this situation correct in pointing out that, as SP16 was with SP18 in Sungei Besi, SP16 could not have possibly witnessed the events that occurred that night at 9.30pm on 14 April 2007 at her home in the factory compound. SP16's testimony could not accordingly be true. Shorn of this direct evidence of SP16, the court is only left with inferences to be made from the telephone call and the SMS which SP18 claimed to have come from the appellant.

[54] The appellant had denied mobile phone No 60146600244 was his and to having sent SMS 'P30' to SP18. We note that the threatening SMS came from a person who called himself 'Shah', and of course, an SMS such as this, bears no signature. The investigating officer had admitted to not having carried out any investigations to confirm from the relevant service provider whether

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Mon Nov 10 08:53:48 2014

mobile phone No 60146600244 was registered in the appellant's name. As submitted by the appellant's counsel there was no confirmatory evidence that the appellant was the registered owner or user of mobile phone No 60146600244 on the day in question.

[55] No question was posed to SP18 whether the appellant was also known as 'Shah'. The trial judge was of the view that there was no necessity to check who mobile No 0146600244 was registered against merely by reason of SP18 having replied spontaneously and without hesitation what her mobile phone number was and her bare statement that 0146600244 to be that of her husband by reason of their relationship as husband and wife. We are unable to agree. We are of the view that common sense and justice demands that the police should have caused investigations to be made with the relevant telecommunication service provider for these confirmatory evidence.

[56] Having subjected the decision of the learned trial judge to close scrutiny, we are unable to agree with his findings. We are of the view that the learned trial judge had not properly evaluated and appraised the evidence. We find his assessment of the evidence to be not in accord with the principles enunciated by law. The trial judge had not correctly applied the correct legal principles to the facts and circumstances of this case. His findings that the evidence taken cumulatively irresistibly point to the appellant having killed Nowshad is not supported by the evidence.

[57] For the above reasons the appeal is allowed. The decision of the trial judge affirmed by the Court of Appeal is set aside. The appellant is accordingly acquitted and discharged.

Appeal allowed.

Reported by Afiq Mohamad Noor